Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

In re: GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, AND THE HONORABLE NATHANIEL R. JONES, JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, THE HONORABLE ANTHONY J. CELEBREZZE, SR., SENIOR JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND THE HONORABLE DAVID D. DOWD, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Of Counsel:
DAVID L. SHAPIRO
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4618

N. VICTOR GOODMAN
Counsel of Record
JAMES F. DELEONE
ORLA E. COLLIER III
MARK D. TUCKER
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF
88 East Broad Street
Columbus, Ohio 43215
(614) 223-9343
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

Whether the District Court exceeded the scope of this Court's remand in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993), when, following such remand, it (1) directed the parties to address an issue other than Plaintiffs-Respondents' "one person, one vote" claim under the Fourteenth Amendment, and (2) granted Plaintiffs-Respondents' Motion to File a Second Amended Complaint.

Whether granting the Petition for a Writ of Mandamus is in aid of this Court's appellate jurisdiction and is warranted by exceptional circumstances, and whether this is the only court which can grant adequate relief.

LISTING OF ADDITIONAL PARTIES

Petitioners

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

Respondents

NATHANIEL R. JONES, Circuit Judge, United States Court of Appeals for the Sixth Circuit, Sitting as United States District Judge for the Northern District of Ohio by appointment pursuant to 28 U.S.C. § 2284, ANTHONY J. CELEBREZZE, SR., Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, Sitting as United States District Judge for the Northern District of Ohio by appointment pursuant to 28 U.S.C. § 2284, DAVID D. DOWD, JR., United States District Judge for the Northern District of Ohio, BARNEY QUILTER, Speaker Pro Tempore of the Ohio House of Representatives, THOMAS E. FERGUSON, Auditor of State of Ohio, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, CLARENCE LUMPKIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, Representative of the 78th Ohio House District, and WILLIAM MALLORY, Representative of the 31st Ohio House District and Majority Floor Leader.

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No. ———

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Pursuant to 28 U.S.C. § 1651(a), Petitioners George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and James R. Tilling, Secretary to the Apportioning Persons (collectively, "Petitioners"), respectfully petition this Court to issue a writ of mandamus to require the United States District Court for the Northern District of Ohio to comply with the mandate of this Court issued in the case of *Voinovich v. Quilter*, October Term, 1992, on March 2, 1993,

and to confine its proceedings on remand to Plaintiffs-Respondents' "one person, one vote" claim as instructed in this Court's opinion.

This petition meets each requirement for this Court's issuance of a writ of mandamus. Supreme Court Rule 20.1. First, there is a clear basis for the exercise of this Court's discretionary authority in aid of its appellate jurisdiction because the District Court disregarded the mandate of this Court.

Second, adequate relief cannot be obtained in any form from any other court because there is no opportunity for immediate appellate review of the District Court's decision. The District Court's Opinion and Order of March 31, 1994, is neither a final order nor an appealable collateral order.

Third, the District Court's Opinion and Order of March 31, 1994, will cause extraordinary hardship, not only for the Petitioners, but also for Members of and candidates for the Ohio General Assembly, as well as the entire electorate of the State, as the decision allows a cloud to continue to hang over Ohio's legislature, its electoral process, and its state legislative districts. The District Court, by granting Plaintiffs-Respondents' motion for leave to file a second amended complaint in order to attempt to state a claim under this Court's decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), not only exceeded the scope of this Court's mandate, but also once again cast doubt upon the validity of Ohio's state legislative districts. Plaintiffs commenced this case challenging the validity of the Ohio apportionment plan over two and one-half years ago. They tried the case on three theories, all of which have now been rejected. The District Court, however, has permitted them to begin anew, perpetuating the uncertainty surrounding the State's legislative districts well into the mid-1990's.

Finally, as pointed out by Judge Dowd in his dissent to the District Court's March 31, 1994, Opinion and Order,

the extraordinary hardship connected with further prolonging this case cannot be justified given the clearly frivolous nature of the Plaintiffs-Respondents' new theory. Thus, the extraordinary relief sought in this Petition is essential in order to bring this lengthy and comprehensive challenge [1] to Ohio's plan of apportionment to a close.

OPINIONS BELOW

The December 22, 1993, Order of the three-judge court has not been officially reported. It was filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91-CV-2219, and is set out in the Appendix hereto at App. p. 1a.

The March 31, 1994, Opinions and Orders of the three-judge court have not been officially reported. They were filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91-CV-2219, and are set out in the Appendix hereto at App. p. 4a and p. 20a.

The following are the District Court's opinions and orders prior to this Court's decision in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993):

The January 31, 1992, Opinion and Order of the three-judge court has been officially reported at 794 F.Supp. 695. It was filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case

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[1] Plaintiffs, either in this case or in the case before the Ohio Supreme Court, *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992), challenged the Ohio apportionment plan on numerous grounds: (1) that it violated Article XI §§ 3, 4 & 7, of the Ohio Constitution; (2) that it violated the Fifteenth Amendment to the United States Constitution because it was the result of intentional racial discrimination; (3) that it violated § 2 of the Voting Rights Act; and (4) that it violated the Equal Protection Clause of the Fourteenth Amendment because it constituted (a) a racial gerrymander, (b) a political gerrymander, and (c) a gender-based gerrymander. None of these claims has been successful.

number 5:91-CV-2219. "Appendix 2" to Judge Dowd's dissenting opinion was filed on February 3, 1992, and is officially reported at 794 F.Supp. 715.

The March 10, 1992, Order of the three-judge court has been officially reported at 794 F.Supp. 756.

The March 19, 1992, Findings of Fact, Supplemental Memorandum of Law, and Order of the three-judge district court has not been officially reported. It was set out in the Appendix to Jurisdictional Statement in *Voinovich v. Quilter*, No. 91-1618, at 127a.

The March 31, 1992, Order of the three-judge district court has been officially reported at 794 F.Supp. 760.

The May 5, 1992, Order of the three-judge district court has been officially reported at 794 F.Supp. 760.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1651 in aid of its appellate jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of constitutional, statutory, and other provisions involved in this case is set out in the Appendix hereto at App. 39a.

STATEMENT OF FACTS

Pursuant to Article XI, § 1, of the Ohio Constitution, the Ohio Apportionment Board convenes every ten years in the year following the decennial census. The 1991 Apportionment Board, consisting of Petitioners Voinovich, Taft and Aronoff and Respondents Ferguson and Quilter, convened on August 22, 1991. D. 147, Ex. A at 1-2. The Board adopted a plan of apportionment for Ohio's General Assembly on October 1, 1991. D. 154, Ex. 16 at 31-32. The Board reconvened on October 3, 1991, to

make several technical amendments to the plan, and the plan adopted on October 3, 1991, was labeled as "Amendment C." D. 154, Ex. 17 at 9-14.

On November 1, 1991, Plaintiffs-Respondents commenced an action in the District Court alleging violations of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution. D.1. On January 31, 1992, the District Court issued its Opinion and Order, declaring that the plan of apportionment violated § 2 of the Voting Rights Act, because the Board had failed to justify its construction of minority controlled districts. *Quilter v. Voinovich*, 794 F.Supp. 695 (N.D. Ohio 1992). The District Court expressly abstained on the Ohio Constitutional issues, noting that these issues were then pending before the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). 794 F.Supp. at 701-02. The Court remanded the plan to the Apportionment Board with an order to justify the minority controlled districts contained in the plan.

On February 14, 1992, the Ohio Supreme Court issued its decision upholding the plan against state constitutional attacks. *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). A majority of the members of the Court directed the Board to make technical corrections to the plan. 63 Ohio St. 3d at 202, 205, 214.

On February 18, 1992, the Board made the technical corrections to the plan as directed by the Ohio Supreme Court. D. 147, Ex. C at 59; D. 147, Ex. A at 107. For the most part, these technical corrections involved reuniting split political subdivisions, D. 192; *Quilter v. Voinovich*, 794 F.Supp. 760, 763 (N.D. Ohio 1992), and the plan, as amended, was labeled as "Amendment D." D. 147, Ex. A. at 107. Also, on February 18, 1992, the Apportionment Board adopted "Findings and Conclusions," which, in the view of a majority of the Board,

"justified" the Board's creation of minority controlled districts under both the original plan and "Amendment D." D. 147 Ex. A.

On March 10, 1992, the District Court ruled that the Board once again had failed to justify its creation of five minority controlled house districts and, therefore, ruled that the plan violated both § 2 of the Voting Rights Act and the Fifteenth Amendment to the United States Constitution. *Quilter v. Voinovich*, 794 F.Supp. 756 (N.D. Ohio 1992).

On March 11, 1992, Petitioners appealed the District Court's order to this Court, D. 164, which, on April 20, 1992, issued a stay of the District Court's orders. *Voinovich v. Quilter*, 112 S.Ct. 1663 (1992). On March 19, 1992, in response to Petitioners' Motion to Stay its March 10, 1992, Order Pending Appeal, the District Court also concluded that four districts under the plan violated the "one person, one vote" requirement of the Fourteenth Amendment to the United States Constitution. D. 173.[2]

On March 2, 1993, this Court reversed the decision of the District Court that the plan violated § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). The Court remanded the case to the District Court "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment," 113 S.Ct. at 1154 (emphasis added), and specifically directed the District Court to address one question:

> Here the District Court found that the maximum total deviation from ideal district size exceeded 10%. As a result, [plaintiffs] established a *prima facie* case of discrimination, and [defendants] were required to

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[2] Petitioners also noticed their appeal from the District Court's March 19, 1992, and March 31, 1992, Orders. D. 174; D. 178.

> justify the deviation. [Defendants] attempted to do just that, arguing that the deviation resulted from the State's constitutional policy in favor of preserving county boundaries. The District Court therefore was required to decide *whether the "plan 'may reasonably be said to advance [the] rational state policy' " of preserving county boundaries "and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of th[e] plan exceed constitutional limits.' "*

113 S.Ct. at 1159 (citations omitted) (emphasis added).

Through a leter from the clerk dated April 30, 1993, the District Court:

> requested briefs from the parties addressing whether the reapportionment plan at issue is violative of the Fourteenth Amendment and whether the deviations from the ideal district size are justified using the analysis employed in *Brown v. Thomson*, 462 U.S. 835 (1993) and *Mahan v. Howell*, 410 U.S. 315 (1973).

D. 222. Both parties filed briefs on remand on June 30, 1993.

By Order dated October 19, 1993, the Court directed Plaintiffs to respond to Defendants' brief on remand and permitted Defendants to file a reply thereto. D. 236.[3] On November 16, 1993, Plaintiffs Ferguson and Quilter filed a "Statement of Counsel" indicating that they intended to make no additional comments on remand. D. 238.

Plaintiff-Respondent Mallory, Representative of the 31st Ohio House District and the Majority Floor Leader, on the other hand, filed a brief in which he again asserted that the plan was violative of § 2 of the Voting Rights

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[3] Judge Peck, a member of the three-judge court in this case, died on September 7, 1993. Respondent Judge Celebrezze, Senior Judge of the Court of Appeals for the Sixth Circuit, thereafter began serving as a member of the District Court panel.

Act, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution. D. 239. With regard to the Fourteenth Amendment, Plaintiff Mallory suggested that the plan of apportionment was invalid under this Court's recent decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993). Defendants replied on November 29, 1993, and advised both Plaintiffs and the District Court that the "*Shaw* issue" was not within the scope of this Court's remand of this case. D. 240.

Nevertheless, on December 22, 1993, the District Court filed an order which stated, in pertinent part:

> The Supreme Court remanded an issue in this case relating to the Court's finding that the maximum total deviation from the ideal district size exceeded 10% and stated:
>
> > On remand, the District Court should consider whether the deviations from the ideal district size are justified using the analysis employed in *Brown, supra*, at 843-846, and *Mahan, supra*, at 325-330.
>
> The Court requests that the parties supplement their briefs on the remand issue and comment on the application of the subsequent decision of the Supreme Court in *Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 2816 (1993).

D. 242 at 1; App. at 1a.

On January 14, 1994, Plaintiffs and Defendants filed their "Supplemental Briefs." D. 245 & 247. Defendants once again expressed their view that consideration of this issue was beyond the scope of this Court's remand. Plaintiffs, in response to the apparent invitation extended by the District Court in its December 22, 1993, Order, filed both a Supplemental Brief, D. 245, and a motion to file a second amended complaint to state a claim under *Shaw*. D. 246. Defendants filed a memorandum in opposition to the motion in which they asserted that allowance of

such an amendment would exceed the scope of this Court's remand and would constitute a serious abuse of discretion. D. 251.

The District Court heard oral arguments on February 9, 1994, during which Plaintiffs not only asked for permission to submit additional evidence on the "*Shaw* issue," but also on their claims that the plan violated § 2 of the Voting Rights Act and Article XI of the Ohio Constitution. D. 261 at 4-5, 8-11. Counsel for Defendants again advised that the remand of this case was "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." 113 S.Ct. at 1154 (emphasis added). D. 261 at 43.

On March 31, 1994, the District Court issued two Opinions and Orders. In the first one, the three-judge court unanimously ruled:

> that the Ohio reapportionment plan survives scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the defendants have advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts; (2) their plan reasonably furthers the rational state policy; and (3) the 13.81% and 10.54% total deviations fall within constitutional limits. Accordingly, we enter judgment for the defendants on this issue.

Quilter v. Voinovich, I, No. 5:91-CV-2219, App. at 19a (N.D. Ohio March 31, 1994). Thus, the District Court resolved the sole issue remanded to it by this Court.

In the second Opinion and Order, however, the District Court, in a two-to-one decision, exceeded the scope of this Court's remand by granting Plaintiffs' motion to file a second amended complaint in order to attempt to state a claim under *Shaw v. Reno*. The District Court brushed aside this Court's mandate limiting the scope of

the issues to be considered by the district court on remand:

> The defendants stress that at one point in its opinion, the Court stated that it was remanding "only" for further proceedings on the population deviation issue. Id. at 1154. This statement, which comes at the end of the opinion's introductory section in which the Court summarizes the facts of the case, appears to indicate simply that the Court is remanding only the population claim and not the Voting Rights Act or Fifteenth Amendment ones. *Though it is presumably within the Court's power to order us not to consider any other issues, this one-time use of the word "only" does not demonstrate that it meant to do so.*

Quilter v. Voinovich, II, No. 5:91-CV-2219, App. at 24a. (N.D. Ohio March 31, 1994) (emphasis added).[4]

Because the District Court's actions clearly exceed the scope of this Court's March 2, 1993, remand of this case, and relief is available from no other source, Defendants have filed this Petition for a Writ of Mandamus.

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[4] The District Court, being acutely aware of its departure from the limited scope of this Court's remand, attempted to obscure its departure by offering several justifications for granting the motion to amend. These justifications are, on their face, blatantly inconsistent. For example, the District Court majority stated that "[t]he issues thus tried [in this case] included those implicated in *Shaw*," and that "plaintiffs' [original] claims [were] . . . closely related to the racial gerrymandering concerns in *Shaw* . . . ." App. at 22a. Yet, the District Court later indicated that because the "*Shaw* issue" now advanced by Plaintiffs is fundamentally different from the issues previously raised, its consideration is not foreclosed by this Court's mandate. App. at 23a-24a.

REASONS FOR GRANTING THE WRIT

THE DISTRICT COURT, TO THE SUBSTANTIAL PREJUDICE OF PETITIONERS, EXCEEDED THE SCOPE OF THIS COURT'S REMAND IN *VOINOVICH v. QUILTER*, 113 S. Ct. 1149 (1993), AND PETITIONERS ARE, THEREFORE, ENTITLED TO A WRIT OF MANDAMUS.

The District Court exceeded the scope of this Court's remand of this case following the decision in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). This Court expressly remanded the case "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." 113 S.Ct. at 1154 (emphasis added). Despite this clear limitation, the District Court has, in effect, ignored the mandate of this Court and reopened the entire case, leaving in question the validity of the Ohio General Assembly districts well into the mid-1990's. This Court's prompt correction of the lower court's error is required in order to bring this already prolonged litigation to a close.

"[A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948). See also *Stanton v. Stanton*, 429 U.S. 501, 502, 504 (1977) ("On remand, the Utah Supreme Court did not consider the issue presented to it and held, instead, that the age-of-majority statute was constitutional as applied to females without considering the discrimination. That action does not comply with our mandate. * * * Accordingly, the judgment of the Utah Supreme Court is vacated, and the case once again is remanded for further proceedings not inconsistent with this opinion.") (footnote omitted); *Mefford v. Gardner*, 383 F.2d 748, 758 (6th Cir. 1967).

Indeed, this Court has long held that "[w]hen a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this court, either

upon a new appeal *or by writ of mandamus.*" *Baltimore & Ohio R. Co. v. United States,* 279 U.S. 781, 785 (1929) (emphasis added) (citations omitted). See also *Vendo Co. v. Lektro-Vend Corp.,* 434 U.S. 425, 427-28 (1978) (*per curiam*) ("We believe that the parties are correct in treating this as an action for mandamus, which is available to a party who has prevailed in this Court if the lower court 'does not proceed to execute the mandate, or disobeys and mistakes its meaning . . . .' * * * If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate of this court.") (citations omitted); *General Atomic Co. v. Felter,* 436 U.S. 493, 497 (1978) (*per curiam*); *Will v. United States,* 389 U.S. 90, 95-96 (1967) (Mandamus is appropriate "where it is necessary to confine a lower court to the terms of an appellate tribunal's mandate.") (citations omitted).

In *United States v. Haley,* 358 U.S. 644 (1959), this Court reversed the district court, leaving only one issue for that court's consideration on remand. The district court, however, went beyond the scope of the Court's remand and adjudicated other issues. On consideration of a motion for leave to file a writ of mandamus, this Court concluded that "[t]he District Court's error should be rectified without delay, and we think that the proper means for accomplishing this is by mandamus." *United States v. Haley,* 371 U.S. 18, 20 (1962) (*per curiam*) (citations omitted). See also *Gaines v. Caldwell,* 148 U.S. 228, 238 (1893) ("[W]e are of the opinion that it is proper for this court, on application for a writ of mandamus, to construe its own mandate in connection with its opinion; and if it finds that the circuit court has erred, or acted beyond its province, in construing the mandate and

opinion, to correct the mistake now and here, and to do so by a writ of mandamus.").[5]

The District Court in this case attempts to justify its reopening of this case by reasoning that because *Shaw v. Reno* was decided after the Court issued its decision in

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[5] The District Court majority attempted to distinguish this Court's decision in *Briggs* and its progeny by citing numerous cases which generally hold that "[w]hile a mandate is controlling as to matters within its compass, on remand a lower court is free as to other issues." App. at 23a (quoting *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979)). These cases are inapposite to the issue now before this Court, *i.e.*, the District Court's *disregard* of this Court's mandate. For example, the Court in *Quern* merely concluded that the law of the case doctrine did not foreclose the lower court's consideration of issues left open by this Court's mandate. The mandate at issue therein had remanded the case "for further proceedings consistent with this opinion." 440 U.S. at 347 n.18. In *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), also cited by the District Court, this Court merely held that its earlier mandate did not bar the lower court's consideration of "subsidiary" or "supplemental" issues such as attorneys fees. In *Jones v. Lewis*, 957 F.2d 260 (6th Cir.), *cert. denied*, 113 S.Ct. 125 (1992), the court concluded that its earlier mandate did not bar consideration of an issue because "this court made no determinations on the merits of [appellant's] case . . . ." 957 F.2d at 262.

None of the cases cited by the District Court majority addressed a situation similar to the situation in this case, *i.e.*, where all of the plaintiffs' claims have been resolved in favor of the defendants, and upon a limited remand from an appellate court, the plaintiffs attempt to circumvent the appellate court's decision by simply asserting a new theory of recovery. Indeed, two of the decisions cited by the District Court majority support *Petitioners'* arguments herein. In *Hester v. International Union of Operating Eng'rs*, 941 F.2d 1574 (11th Cir. 1991), the Eleventh Circuit affirmed the district court's denial of a motion designed to amend the complaint on remand in order to "resurrect" a claim previously resolved against the plaintiff. 941 F.2d at 1578. And, in *Rutherford v. United States*, 806 F.2d 1455 (10th Cir. 1986), the Tenth Circuit stated that "[t]he lower court has no discretion if the appellate court mandate either calls for or precludes amendment [of the complaint] or *if amendment would run counter to the appellate court mandate.*" 806 F.2d at 1460 (emphasis added).

this case, the Ohio reapportionment plan must be evaluated in light of *Shaw*:

> [T]he contours of the cause of action established in *Shaw* were unclear until the issuance of the opinion in that case, so it is unfair for us to have expected the plaintiffs to have specifically articulated the issue earlier. Due to the closeness of the issues, we feel that the fact that *Shaw* had not yet been decided is the only reasonable explanation for why the plaintiffs did not make the specific claim previously. As just one example, the Plaintiffs' Proposed Findings of Fact, submitted prior to our earlier decision, contains a fourteen-page argument under the heading, "1991 Plan Violates Ohio Constitution as a Result of Race Conscious Gerrymandering." R. —— at 114-28. We must assume that the plaintiffs would have alleged racial gerrymandering in violation of the Fourteenth Amendment as well, had such a cause of action been recognized.

Quilter v. Voinovich, II, No. 5:91-CV-2219, App. at 25a-26a (N.D. Ohio March 31, 1994).[6]

It is well established, however, that this Court's mandate is unaffected by its subsequent decisions:

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[6] Contrary to the District Court's assertion, Plaintiffs-Respondents had previously advanced the argument that the Petitioners engaged in racial gerrymandering in violation of the Fourteenth Amendment. They did so in the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992), wherein they asserted that alleged racial gerrymandering by Petitioners (Plaintiffs in that case) prevented the issuance of a declaratory order upholding the plan. *Defendants Ferguson and Quilter's Prehearing Brief* at 17 ("The Plaintiffs' unlawful, racially conscious activity described above in drawing and adopting the 1991 apportionment plan violates the Equal Protection Clause of the Fourteenth Amendment."). For one reason or another, they chose not to advance that particular theory in this case until invited to do so by the District Court in its December 22, 1993 Order. A copy of the relevant portions of Plaintiffs-Respondents' *Prehearing Brief* filed in the Ohio Supreme Court is included in the Appendix hereto at p. 36a.

> As to the suggestions that the views adopted by this court in its decision in *McDonald v. Belding*, 145 U.S. 492, 12 S.Ct.Rep. 892, (decided by this court after the present cases were decided,) would, if applied to the present cases, have caused a different result in them, we are of opinion that, without conceding that such would have been the result, this court cannot, on well-established rules and principles, permit the circuit court, of its own motion, to go back of, or subvert, what was settled by the opinion and mandate in the present cases.

Gaines, 148 U.S. at 244.

Indeed, this Court was unquestionably aware of the issue raised in *Shaw v. Reno* when it issued the decision in this case. Nevertheless, the Court did not remand this case for consideration of the issue raised in *Shaw*.[7] Rather, it remanded this case "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." *Voinovich v. Quilter*, 113 S.Ct. at 1154 (emphasis added). This Court did not remand the case to consider *all* potential Fourteenth Amendment claims. It remanded

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[7] This Court noted probable jurisdiction in *Shaw* on December 7, 1992, the day prior to the oral argument in this case. *Shaw v. Barr*, 113 S.Ct. 653, 121 L.Ed.2d 580 (1992). In its order noting probable jurisdiction in *Shaw*, the Court limited the issue for its consideration:

> Dec. 7, 1992. In this case probable jurisdiction is noted. Argument shall be limited to the following question, which all parties are directed to brief: "Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own."

113 S.Ct. at 653-54. Moreover, the pendency of *Shaw* was referred to by the Solicitor General at oral argument in the present case. Trans. of Oral Argument at 17.

for consideration of one claim, the "equal population [one person, one vote] claim."

Moreover, this Court noted in its unanimous opinion in this case that the "*Shaw* issue," *i.e.*, the validity of race-based redistricting under the Fourteenth Amendment, had not heretofore been raised in this case:

> Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here.

Voinovich v. Quilter, 113 S.Ct. at 1157. Racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment simply was not, and is not, an issue in this case. Consequently, it was entirely inappropriate for the District Court to go beyond the scope of this Court's remand by granting Plaintiffs' motion to file a second amended complaint to state a new claim in this case.

Judge Dowd correctly noted in his dissent to the District Court's Opinion and Order granting leave to file a second amended complaint that "the recent decision of *Shaw v. Reno*, 113 S.Ct. 2816 (1993)[,] dealing with Congressional redistricting for the State of North Carolina[,] is anchored in a factual situation strikingly dissimilar to the reapportionment of Ohio for its General Assembly." App. at 27a. See also Pildes & Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 Mich.L.Rev. 483, 496-99 (1993) (distinguishing in detail *Voinovich and Shaw*).[8] Had this Court believed that the *Shaw* issue was somehow germane to this case, it could

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[8] One of this article's authors, Professor Richard H. Pildes of the University of Michigan Law School, served as a consultant to the Special Master appointed by the District Court in this case. 92 Mich.L.Rev. at 496 n.63; D. 271.

have addressed the issue in its opinion, or held this case for *Shaw* and then remanded for reconsideration in light of *Shaw*. This Court did neither, but rather remanded this case for consideration of a single issue.[9]

Ordinarily, the amendment of pleadings is a matter within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). An abuse of discretion is manifest when the District Court grants a motion to amend a complaint late in the proceedings. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258-59 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 2889 (1991).

Following trial of the case, " 'a complaint cannot be amended . . . where the amendment raises issues not within the theory on which the case was tried.' " *Worley v. Columbia Gas of Ky., Inc.*, 491 F.2d 256, 265 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974). See also *Lynch v. Dukakis*, 719 F.2d 504, 508-09 (1st Cir. 1983) ("Therefore, an amendment after judgment is not permissible if it brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is some evidence in the record—introduced as relevant to some other issue—that would support the amendment."); *United States, ex rel. Townsend v. Ogilvie*, 360 F.2d 925 (7th Cir.) (following remand of the case, district court properly denied motion to amend the pleading "to set forth grounds not theretofore presented" because to do so would deviate from the court of appeal's mandate), *cert. denied*, 385 U.S. 938 (1966); *Equitable Life Assurance Soc'y v. Mercantile-Commerce Bank & Trust Co.*, 155 F.2d 776, 779 (8th Cir.) (fol-

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[9] Indeed, this Court in *Shaw* itself gave a clear indication of how it could have left the issue open for the District Court's consideration in this case had it chosen to do so. In *Shaw*, the Court stated that certain arguments "were not developed below, and the issues remain open for consideration on remand." 113 S.Ct. at 2831. In contrast, the Court explicitly remanded this case for the consideration of a single issue.

lowing remand, district court properly denied motion to amend pleading where the "case had been remanded 'for limited purposes' only"), *cert. denied*, 329 U.S. 760 (1946); *Cohen v. Illinois Inst. of Technology*, 581 F.2d 658, 662 (7th Cir. 1978) (amendments to pleadings following remand are generally not allowed because to do so would, in effect, permit interlocutory appeals), *cert. denied*, 439 U.S. 1135 (1979).[10] The District Court's allowance of Plaintiffs' amendment in this case goes beyond a mere abuse of discretion. Rather, such allowance is a

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[10] In *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974), the Sixth Circuit affirmed the district court's denial of a motion to amend the complaint following its remand of the case from an earlier appeal:

> [Plaintiff] has moved to amend its pleadings to assert an alternative theory of recovery . . . . * * * The only excuse offered for this delayed presentation is that [plaintiff] misconceived the law. * * *
>
> A misconception of the law is not an excuse for the late presentation of an alternative theory of recovery. No reason is shown why [plaintiff] could not have presented its alternative theory initially. * * * A losing party can always argue in retrospect that he misconceived the law. * * *
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> As pointed out by the Supreme Court . . . , a trial court is required to take into account any prejudice that the party opposing the motion to amend would suffer. Here the prejudice to [defendant] is obvious. The case has been pending for more than two and one-half years, and [defendant] already has had to defend against one theory at both the district court and the appellate court levels. The District Court would have been justified in concluding that to put [defendant] through the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would be manifestly unfair and unduly prejudicial.
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> * * *
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> *Here [plaintiff] proceeded under one theory through the Court of Appeals where it lost. Now it wants to repeat the whole cycle again. We are unwilling to reverse the decision of the District Court. The time has come to bring this extended litigation to an end.*

Troxel Mfg. Co., 489 F.2d at 970-71 (citations omitted) (emphasis added).

complete disregard of this Court's March 2, 1993, mandate.

In the case at bar, Plaintiffs were given every opportunity to formulate and litigate their claims. This Court addressed each of those claims, and left one, and only one, issue for the District Court to decide on remand. The District Court should not permit the Plaintiffs at this late stage of this litigation—some twenty-nine months after this litigation began, more than thirteen months after this Court's decision in this case, and nine months after this Court's decision in *Shaw*—to retry this case on a new and distinct claim. The District Court, contrary to the mandate of this Court, has permitted Plaintiffs to change the theory upon which their case was tried and reviewed by this Court.[11]

Indeed, the retrial of this case apparently involves reopening Ohio Constitutional issues as Plaintiffs premised their motion to amend, in part, upon alleged violations of the Ohio Constitution.[12] Those issues were presented to

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[11] As noted at page 16, *supra*, this Court expressly stated:

> Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here.

Voinovich v. Quilter, 113 S.Ct. at 1157.

[12] At the February 9, 1994, hearing, Petitioners advised the Court that the alleged constitutional errors identified by the Plaintiffs-Respondents were contained in "Amendment C" or the "1991 plan." Both the District Court and this Court noted that those errors were corrected with the adoption of "Amendment D" or the "1992 plan" on February 18, 1992, as directed by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). See *Quilter v. Voinovich*, 794 F.Supp. 760, 763 ("The 1991 Plan ['Amendment C'], however, contained several serious errors and omissions as detailed in a thirteen page submission from the defendants. * * * These deficiencies were corrected in the 1992 Plan ['Amendment D']."). *Voinovich v. Quilter*, 113 S.Ct. at 1148 ("The board also adjusted the plan to correct 'technical' errors that the Ohio Supreme Court had identified in its independent review of the

the Ohio Supreme Court during its independent review of the apportionment plan, and it directed Defendants to make a series of technical corrections. *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). Furthermore, the District Court earlier abstained on the state constitutional issues in this case. *Quilter v. Voinovich*, 794 F.Supp. 695, 702. The District Court's January 31, 1992, decision to abstain on these issues is consistent with this Court's admonition that "federal judges [are required] to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." *Growe v. Emison*, 113 S.Ct. 1075, 1080 (1993). Now the District Court has presumably reopened these long settled issues of state constitutional law by permitting Plaintiffs to amend their complaint.

Not only have Defendants [Petitioners here] been prejudiced by this amendment, *Prather*, 918 F.2d at 1259 ("To force [defendant] to begin to formulate a defense to these [new claims] at this late date would be highly prejudicial."), but 292 candidates who filed petitions to run for seats in the General Assembly prior to the February 17, 1994, deadline, and all the voters of Ohio have been prejudiced by once again leaving in doubt the validity of the plan of apportionment for the General Assembly.[13] This Court should erase that doubt by issuing a writ of mandamus directing the District Court to confine itself to

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plan."). Plantiffs, nevertheless, persisted with their attacks on a nonexistent plan of apportionment, and argued, in effect, that nonexistent constitutional errors were the result of impermissible racial gerrymandering. D. 261 at 8-11.

[13] Two hundred and ninety-two (292) individuals filed nominating petitions as partisan candidates for seats in the 121st Ohio General Assembly with the appropriate county boards of elections prior to the February 17, 1994, filing deadline, and have been certified to the May 3, 1994, primary election ballot. Affidavit of John F. Bender, set forth in Appendix hereto at 41a.

this Court's remand.[14] Because the District Court has resolved the one issue remanded to it by this Court, this Court's writ should further direct the District Court to enter final judgment in favor of the Defendants-Petitioners.

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[14] Although Plaintiffs acknowledged that their first amended complaint did not state a claim for racial gerrymandering under the Fourteenth Amendment, D. 246 at 3, they nevertheless asserted that a second amendment is necessary to conform to the evidence in this case. The amendment does not, however, conform to Plaintiffs' prior evidence and theory, but rather is inconsistent therewith. During the trial and appeal of this action, Plaintiffs did not maintain that Defendants impermissibly took race into account in drawing districts for the Ohio General Assembly. Rather, as noted by this Court, they simply asserted that Defendants should have taken race into account towards a different end, because "[i]n [plaintiffs'] view, the plan should have created a larger number of 'influence' districts—districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice." *Voinovich v. Quilter*, 113 S.Ct. at 1153. See also D.48 at 30 ("Mr. Gilliam: Your Honor, I think the answer to that is the board can look to that in drawing districts. The board can certainly look to see what the minorities, where minorities lived and they could look at a totality of circumstances."); D.48 at 99. Plaintiffs' second amended complaint, on the other hand, challenges the mere consideration of race. Under such circumstances, the amendment cannot be said to "conform to the evidence presented at trial."

CONCLUSION

For the reasons stated, Petitioners respectfully request this Court to issue a writ of mandamus to the Judges-Respondents directing them to vacate their Opinion and Order of March 31, 1994, granting Plaintiffs' motion to file a second amended complaint, and to confine their proceedings on remand to the Plaintiffs-Respondents' "one person, one vote" claim as instructed in this Court's opinion in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). Because the District Court has now resolved that claim in favor of the Defendants-Petitioners, this Court should further direct the District Court to enter judgment in favor of the Defendants-Petitioners.

Respectfully submitted,

N. VICTOR GOODMAN
Counsel of Record
JAMES F. DELEONE
ORLA E. COLLIER III
MARK D. TUCKER
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF
88 East Broad Street
Columbus, Ohio 43215
(614) 223-9343
Counsel for Petitioners

Of Counsel:
DAVID L. SHAPIRO
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4618

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